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OFFICE OF PETITIONS

In re Application of
Robert James Gerndt, et al.
Application No. 09/240,524
Filed: January 29, 1999
Attorney Docket No. KCC-14-026

ON PETITION

The above-identified application has been referred to the Office of Petitions for consideration of the petition, filed March 25, 2004, to revive the above-identified application under the provisions of 37 CFR 1.137(b).

The petition is **DISMISSED**.

Any request for reconsideration of this decision must be submitted within TWO (2) MONTHS from the mail date of this decision. Extensions of time under 37 CFR 1.136(a) are permitted. The reconsideration request should include a cover letter entitled "Renewed Petition under 37 CFR 1.137(b)." This is **not** final agency action within the meaning of 5 U.S.C. § 704.

A grantable petition under 37 CFR 1.137(b)¹ must be accompanied by: (1) the required reply,² unless previously filed; (2) the petition fee as set forth in 37 CFR 1.17(m); (3) a statement that the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to 37 CFR 1.137(b) was unintentional; and (4) any terminal disclaimer (and fee as set forth in 37 CFR 1.20(d)) required by 37 CFR 1.137(c). Where there is a question as to whether either the abandonment or the delay in filing a petition under 37 CFR 1.137 was unintentional, the Commissioner may require additional information. See MPEP 711.03(c)(III)(C) and (D). The instant petition lacks item 1.

A review of the record discloses that a final Office action was mailed March 22, 2002. A Notice of Appeal was filed on July 2, 2002. While an appeal brief must be filed in triplicate and include the appeal brief fee therefor, applicant filed one copy of the appeal brief on August 22, 2002, without the fee required for filing a brief in support of an appeal. On May 1, 2003, the appeal brief fee was filed, along with an additional copy of the August 22, 2002 appeal brief. Since a proper response was not filed, the application became abandoned after midnight September 2, 2002.

On March 25, 2004, the present petition was filed, along with the fee required for filing a brief, 3 copies of the appeal brief and a "Request to the Examiner to Resubmit Application to the Board

¹ As amended effective December 1, 1997. See Changes to Patent Practice and Procedure; Final Rule Notice, 62 Fed. Reg. 53131, 53194-95 (October 10, 1997), 1203 Off. Gaz. Pat. Office 63, 119-20 (October 21, 1997).

² In a nonprovisional application abandoned for failure to prosecute, the required reply may be met by the filing of a continuing application. In an application or patent, abandoned or lapsed for failure to pay the issue fee or any portion thereof, the required reply must be the payment of the issue fee or any outstanding balance thereof.

of Patent Appeals and Interferences for Decision on Appeal". However, 37 CFR 1.137(d) requires that a petition under 37 CFR 1.137(b) be accompanied by a terminal disclaimer (and fee), regardless of the period of abandonment in an utility or plant application filed on or after June 8, 1995, but before May 29, 2000, where the application became abandoned during appeal. The reason being that utility and plant patents issuing on applications filed on or after June 8, 1995 but before May 29, 2000 are eligible for the patent term extension under former 35 U.S.C. 154(b). Note MPEP, Rev. 1, Feb. 2003 under **G. Terminal Disclaimer Requirement** (page 700-171).

Accordingly, this application cannot be revived until the filing of a terminal disclaimer dedicating to the public a terminal part of the term of any patent granted on the above-identified application or any patent granted on any continuing application that contains a specific reference under 35 U.S.C. 120, 121, or 365(c) to the above-identified application. The period to be disclaimed will be a terminal part of the patent to be granted equivalent to the period of abandonment. A terminal disclaimer fee of \$110 is required. If the terminal disclaimer is signed by an assignee, the assignee must comply with the requirements of 37 CFR 3.73(b).

Since receipt is acknowledged, on May 1, 2003, of the fee required for filing a brief in support of an appeal, the \$330 fee submitted with the present petition is unnecessary and will refunded to counsel's deposit account.

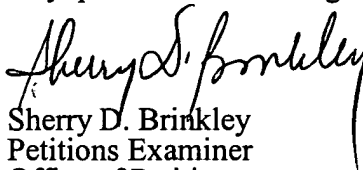
Further correspondence with respect to this matter should be addressed as follows:

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The centralized facsimile number is (703) 872-9306.

Any questions concerning this matter may be directed to the undersigned at (571) 272-3204.


Sherry D. Brinkley
Petitions Examiner
Office of Petitions
Office of the Deputy Commissioner
for Patent Examination Policy

Conferee: Brian Hearn 